United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1039

B P/S

In The

United States Court of Appeals

For The Second Circuit

In the Matter of

MICHAEL F. COIRO, JR.,

Attorney for Thomas De Simone,

Appellant.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR APPELLANT, MICHAEL F. COIRO, JR.

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BRIEF FOR APPELLANT MICHAEL F. COIRO, JR.

Preliminary Statement

MICHAEL F. COIRO, JR., appeals from an Order entered in the United States District Court for the Eastern District of New York (Bartels, J.) punishing him for contempt of Court. After a hearing pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure, Appellant was assessed costs of One Thousand ($1000.00) Dollars.

The Order to Show Cause which sets forth the

charges against Appellant appears on pages 4 through 6 of the Appellant's Appendix.

STATEMENT OF THE FACTS

The Appellant, MICHAEL F. COIRO, JR., is an attorney with an active trial practice in both the Federal and State Courts.[1] On May 2nd, 1974, Appellant undertook the representation of Thomas De Simone, a defendant named in Indictment 74 CR 336 filed in the District Court on the previous day, May 1st.[2]

The facts relevant to this Appeal are not in dispute. The De Simone case was first tried in October of 1974. On October 3rd, 1975, a mistrial was declared after the jurors reported that they were unable to reach a unanimous verdict. Following dismissal of the jury, retrial was set for November 18th, 1974. Thereafter, the case was re-scheduled to begin on November 25th, 1974. This adjournment was at the request of Government counsel.

Five days prior to the scheduled date of trial,

1/ The Government's Brief in United States v. Polisi, 74-2656, (argued March 21st, 1975), describes Coiro as "well known and highly competent trial counsel". Gov't. Br. p. 7.

2/ The three count Indictment charged violations of Title 18, United States Code, Section 549, 659, 1951 and 2.

on November 20th, 1974, Appellant contacted Judge Bartels' Chambers and requested an adjournment of the De Simone trial on the ground that he was unavoidably engaged in the trial of another criminal case in the New York State Supreme Court, Queens County. This request for an adjournment was denied. The Trial Court, disregarding counsel's actual engagement, summoned a jury panel and stood ready to try the case. As Appellant was actually engaged in trial, he did not appear.

Although the District Court had been informed that the State Court case would last for several weeks, the De Simone trial was re-scheduled for one week later, December 2nd, 1974. In response to notification of the December 2nd date, Appellant submitted a sworn affidavit which recited the fact that he was still engaged in the trial of the same case in Queens County. On the basis of this affidavit the trial was again re-scheduled for January 6th, 1975, when it was ultimately tried.

On December 9th, 1974, Judge Bartels signed an Order directing Appellant to show cause why he should not be punished for contempt of Court, pursuant to Title 18, United States Code, Section 401(3) and Rule 42(b) of the Federal Rules of Criminal Procedure. The Order to Show Cause set forth the above stated facts.

On January 16th, 1975, a hearing was held on the contempt charge.[3] At that hearing Appellant explained his inability to begin the De Simone trial on the scheduled date of November 25th. One week earlier, on November 18th, 1974, Appellant made an appearance in the Criminal case of People of the State of New York v. Joseph Zevrizzo. (A 12)[4] This was a multiple defendant case involving five defendants represented by four lawyers. Appellant stated that he did not immediately inform Judge Bartels of the Queens engagement because there were plea negotiations and "counsel thought that the case would ultimately be disposed of by way of a plea." (A 12) As soon as counsel realized that the case would have to be tried he informed Judge Bartels' Chambers. (A 12-13) Exercising even further caution, Coiro asked that the State Supreme Court Justice's law secretary contact Judge Bartels to officially notify him of the engagement. (A 13) This effort was unsuccessful due to the intervening Thanksgiving Holiday. (A 13)[5]

Appellant further explained that he made the State

3/The transcript of that hearing appears in the Appendix at pages 7 through 25.

4/The letter "A" refers to the Appellant's Appendix.

5/This call was made after the scheduled date of November 25th but before the adjourned date of December 2nd, 1974.

Court Justice aware of his imminent Federal engagement but nevertheless was ordered to proceed to trial. (A 15, 18, 21) In Appellant's words, "He ordered me to proceed anyway. He had the other three lawyers there." (A 21) Rejecting this excuse, the Federal District Court Judge reasoned that he could protect counsel from a contempt proceeding from the State Court Judge but conversely the State Court Judge could not protect counsel from a Federal contempt proceeding. (A 23) Recognizing that counsel was on the horns of a dilemma, Judge Bartels concluded by stating that "You just bet on the wrong horse." (A 23) On the basis of this conduct, Appellant was "charged" One Thousand ($1000.00) Dollars. (A 23)

STATUTES INVOLVED

Title 18, United States Code, Section 401, provides that

> "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
>
> (1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) misbehavior of any of its officers in their official transactions;
>
> (3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

RULES INVOLVED

Rule 42(b) of the Federal Rules of Criminal Procedure provides as follows:

> "(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Rule 7 of the Individual Assignment and Calendar Rules of United States District Court for the Eastern District of New York provides:

> "Conference 'After a case has been assigned, the judge may direct the attorneys for each party to meet with him to discuss the case informally, to entertain oral motions and, to the extent possible and desirable, to discuss settlement or to set a schedule for the case, including for discovery, pre-trial and trial."

QUESTION PRESENTED

1. Whether Appellant's conduct in the case at bar was sufficient to warrant a conviction for criminal contempt?

POINT I

FOR PURPOSES OF REVIEW THE ACTION TAKEN BY THE DISTRICT COURT MUST BE CONSIDERED AS A CRIMINAL CONTEMPT.

In an obvious effort to deflect the impact of a criminal contempt, the Trial Court provided Appellant with the choice of a fine or assessment of costs.

> "The Court: One way I find you guilty of contempt, and the other way, I will charge you cost, whatever you wish.
>
> "Mr. Coiro: I never had this done in 20 years that I have been admitted, never even had a complaint at the Bar Association.
>
> I have had an unblemished record." (A 20)
>
> * * *
>
> "The Court: Do you want it as cost or a fine?
>
> "Mr. Coiro: I would like to keep my record as clean as I can." (A 23)

Therefore, on the ostensible basis of misspent witness and jurors' fees, Appellant was charged costs in

the amount of One Thousand Dollars. (A 23 - 24)[6]

Despite the Trial Court's characterization of its sanction as something less than criminal contempt, for purposes of review by this Court, the action taken must be considered in that context. Simply stated, the label attached is not determinative. The Order to Show Cause is specifically pleaded in a criminal milieu. Indeed, the prayer for relief cites specific reference to the criminal contempt provisions of Title 18, United States Code, Section 401(3) and Rule 42(b) of the Federal Rules of Criminal Procedure. The hearing on the Court's Order to Show Cause discloses that an essential ingredient of the punishment was to deter others from engaging in similar conduct. The Trial Court stated that

> "It is my duty to set the rules straight so that others cannot follow." (A 16)

Earlier the Court had stated that

> "Now, I am giving you this Order to Show Cause not because I want in any way to impose sanctions on you for my sake, but I want to protect this court.
>
> "I am representing the court on the court [sic] as a whole." (A 15)

In Nye v. United States, 313 U. S. 33 61 Sup. Ct.

6/With all due respect this expenditure was singularly attributable to the Trial Court who had been informed five days earlier that Coiro was actually engaged.

810 (1941) the Supreme Court re-affirmed certain principles relevant to the case at bar. Referring to an earlier decision in Mc Crone v. United States, 307 U. S. 61, 59 Sup. Ct. 685 (1939), the Court stated that

> "While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purpose of the complainant, and is not intended as a deterrant to offenses against the public." (Emphasis supplied.)

Applying that test to this case, it is clear that the contempt cannot be classified as civil. And as in Nye, the fact that Coiro was "ordered to pay the costs of the proceeding...is also not decisive." 313 U. S. at p. 42. Referring to Mr. Justice Brandeis' opinion in Union Tool Company v. Wilson, 259 U. S. 107, 110, 42 Sup. Ct. 427, 428 (1922) the Nye Court stated that

> "Where a fine is imposed, partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominent and fixes its character for purposes of review."

There can be no question in the case at bar that the "charge of costs" was at least in part punishment and, therefore, the criminal feature fixes its character for purposes of review. As in Nye,

> "The prayer for relief and the acts charged carry the criminal hallmark."

See also Penfield Co. v. S. E. C., 330 U. S. 585 (1947)

In any event, it would seem inconceivable that the safeguards attendant to a criminal contempt proceeding are inapplicable because the Trial Court allowed Appellant to choose a procedural vehicle which would perpetuate his otherwise unblemished record. In other words, if Appellant when asked had chosen a criminal contempt and fine, no procedural question would remain. The fact that he chose a milder sanction, when the alternative really left no choice, should not be taken as a compromise of Appellant's rights. To draw a concededly overdramatic analogy, it would be as if a convict were given the choice between execution and imprisonment with the understanding that he cannot appeal from the latter.

POINT II

THE CONDUCT OF THE APPELLANT HEREIN CANNOT SUPPORT A FINDING OF CONTEMPT.

As developed in the Statement of Facts, Appellant notified Judge Bartels five days prior to the scheduled date of trial that he had become engaged in another criminal matter at the direction of a New York State Supreme Court Justice. Appellant's sin, if that be an appropriate description, was that he "allowed himself" to become en-

gaged knowing that the case of United States v. De Simone was to begin on November 25th, 1974. The circumstances surrounding the State Court engagement, however, belie any assertion that Appellant acted with deliberate or cavalier disregard for the trial date set by Judge Bartels.

First, there was an uncontradicted representation by Appellant that the State Court justice had been made aware of the prospective Federal engagement and had nevertheless ordered that the trial begin in the multiple defendant case before him. Indeed, this factual representation was specifically accepted by the Trial Court.

"Mr. Coiro: Your Honor, might my partner approach the bench? This is Mr. Quagliata.

Judge Bartels, my partner has just refreshed my recollection.

Just state to Your Honor, I did tell Judge Weinstein that I did have to appear before Your Honor to try this case.

In all honesty and fairness to Your Honor, I have to state that I don't make a misstatement to any Court. I don't know whether I told that to Judge Weinstein on the record, or when we were discussing it in his chambers, and I am telling you that with all candor.

"The Court: Oh, well, I believe you.

"Mr. Coiro: He ordered me to proceed anyway. He had the three other lawyers there." (A 20 - 21)

As previously noted, on November 20th, immediately after counsel learned that the State case would not be disposed of by pleas of guilty, Appellant called Judge Bartels' Chambers to inform him of his predicament. In addition, the record reflects that between November 25th and the adjourned date of December 2nd, Appellant requested that the State Supreme Court Justice have his law secretary contact the Federal Judge in order to officially communicate his engagement.

Recently, in In Re Williams, -- F. 2d -- (2nd Cir., Jan. 10th, 1975) Slip Op. p. 1277, this Court stated that

> "To warrant a conviction in criminal contempt, the contemnor's conduct must constitute misbehavior which rises to the level of an obstruction of and an imminent threat to administration of justice, and it must be accompanied by the intention on the part of the contemnor to obstruct, disrupt or interfere with the administration of justice."

Furthermore, the necessary quantum of evidence is proof beyond a reasonable doubt. Slip Op. p. 1299.[7] See, United States v. Peterson, 456 F. 2nd 1135, 1140 (10th Cir., 1972). Appellant's contention at bar is simply that he did not have

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[7] It is appropriate to note that in Williams the District Court referred to the proceeding as a civil contempt. The same is true in the instant case. (A 9) Nevertheless, in Williams the Court found that the contempt charge was criminal in nature. Slip Op. p. 1295.

the requisite intent to support a finding that he was in contempt of the District Court.

In Sykes v. United States, 444 F. 2d 928 (D.C. Cir., 1971) the Court noted that contempt is a

> "...wilful disregard or disobedience of a public authority."

Sykes also involved the failure of an attorney to appear in Court at the appointed time. This failure was attributed to "lax of memory, pre-occupation with another case, and confusion as to dates." The Court concluded that

> "There was no evidence that he deliberately or recklessly disregarded his obligation to the Court, or that he intended any disrespect for the court." 444 F. 2nd at p. 930.

The case at bar is even more compelling. Here, the attorney took every step which he judged appropriate in order to satisfy the demands of both the state and federal cases. Appellant's conduct and the tone of his explanation to the District Judge indicate beyond peradventure that Appellant meant no disrespect either by his action or his words. Clearly then, there is no evidence whatsoever that Coiro "deliberately or recklessly disregarded his obligation to the court, or that he intended any disrespect for the court".

Some two years after the Sykes decision, the same court decided In Re Farquhar, 492 F. 2d 561 (D.C. Cir., 1973).

This case again involved an attorney who had been held in contempt. In reversing the contempt conviction, the court noted that

> "Criminal contempt requires both a contemptuous act and a wrongful state of mind."

In Farquhar, Judge Wilkey dissented in a scorching opinion. This dissent rested, however, on the fact that the attorney "placed himself at another location at the moment appointed for his appearance in the trial in which he was already engaged". (Emphasis supplied) Here the Federal case had not yet begun. Farquhar's conduct, therefore, was less defensible than the conduct at bar. Nevertheless, a majority of the Farquhar court reversed.

Cases which have upheld contempt convictions entered against attorneys are patently dissimilar to the facts at bar. In In Re Gates, 478 F. 2d 998 (D.C.Cir., 1973) the attorney who had a conflicting engagement "did not communicate it with theCourt or appear in Court to request any continuance or time". See also In Re Niblack, 476 F. 2d 930 (D.C. Cir., 1973) where there was absolutely no jusitification for the attorney's tardiness.

In In Re Cohen, 370 F. Supp. 1166 (S.D.N.Y., 1973) Judge Weinfeld stated that in a contempt proceeding one of the elements which must be established beyond a reasonable doubt

is

> "That such misbehavior[the contemptuous act] was engaged in by respondent wilfully, deliberately and with intent to obstruct the administration of justice." 370 F. Supp. at p. 1176.

In the instant case there has been absolutely no evidence of such wilfulness on the part of Appellant.

In retrospect it may be that Judge Bartels' procedural suggestion for resolving a conflict between state and federal cases is entirely correct. It may also be true that the conflict here should have been approached in a different manner. However, the manner in which it was approached by this counsel does not rise to the level of a criminal contempt.

CONCLUSION

Chief Judge Kaufman, in expressing the need for qualified counsel, recently wrote that

> "The lawyers' efforts are an essential ingredient in the ultimate product of the judicial system, the dispensing of justice, and to the extent that the ingredients are of poor quality, the final product is bound to suffer."[8]

However desirable, it is pragmatically impossible to have capable and experienced trial counsel free of demanding commitments. The phenomenon of over-loaded dockets brings

8/ Does A Judge Have A Right To Qualified Counsel? New York Law Journal March 27th, 1975, page 1.

pressure to bear on counsel as well as the Courts. To satisfy both the public interest and the administration of justice, the work-load of our courts must be dealt with through a spirit of cooperation among the court, the prosecutor and the defense bar. Punishment of counsel who finds himself on the horns of a dilemma such as that at bar does not satisfy the goals or objectives of this effort.

For the foregoing reasons, it is respectfully submitted that the Order of the District Court should be reversed.

Respectfully submitted,

La Rossa, Shargel & Fischetti
Attorneys for Michael F. Coiro, Jr.
Contemnor-Appellant

Gerald L. Shargel
Of Counsel

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re
MICHAEL F. COIRO, JR.,
Attorney for Thomas De Simone,
Appellant.

against

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 9th day of April 1975 ~~XXXX~~ at 225 Cadman Plaza, Brooklyn, N.Y.

deponent served the annexed Brief upon

David G. Trager

the attorney in this action by delivering 2 true copy LS thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 9th
day of April 1975 ~~XXXXX~~

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0716850
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, ~~1975~~ 1977